IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

CIVIL SECOND APPEAL No. 5 of 1988

MAHENDRA KUMAR
V/S
SUBHAS CHAND & ORS.

Mr. AMIT MEHTA for Mr. RR NAGORI, for the appellant

Mr. BR MEHTA, for the respondent

Date of Order : 19.9.2006

HON'BLE SHRI N P GUPTA,J.

JUDGMENT

This appeal has been filed by the defendant against the judgment and decree of the learned Addl. District & Sessions Judge, Bikaner dt. 26.8.1987, reversing the judgment of the learned Munsif Bikaner dt. 4.2.1982, and thereby decreeing the plaintiff's suit, canceling the sale made by the Urban Improvement Trust, in favour of the appellant, and declaring the disputed land to be 50ft wide public way, and issuing perpetual injunction against the defendants, not to take possession over this land, nor to obstruct the way.

Facts of the case are, that the plaintiff respondent filed a suit for declaration and perpetual injunction, alleging interalia, that his house is situated in Rathkhana Colony, Bikaner, in east whereof there existed

a public way, which existed since before purchase of the land by his mother, and did exist in view of their being a public well, and relying upon existence of public way, her mother had purchased the land. It was then alleged, that one Pannalal Barupal in the capacity of Adhyaksh, Jagjeevan Sarvodaya Ashram Trust moved an application on 10.12.59, before the City Improvement Committee, for purchase of this land, whereupon notice was published on 28.11.63. It was alleged that on 31.12.59 the Overseer submitted the report against proposal of sale. Thereupon Pannalal got filed an application from his daughter Smt. Jamna Devi, in the name of her minor son, (present appellant) on 8.11.60, regarding which no notice etc. was published, and the then Chairman in a secret, one sided manner, passed the order to sell the land. Coming to know thereof, the plaintiff submitted objections, but they were not decided. However, after that Chairman ceased to be in office, various irregularities, including the sale of land of public way, being sale in question, came to light, and vide decision dt. 6.2.68, the matter was referred to the State Government. Interalia with this, it was claimed, that the sale effected by the defendant, being of public way, is wholly without authority of law, the notice that was published, was with respect to the application of Pannalal only, while the plaintiff is neighbour of this land, and uses this land as way, which could not be sold. With these allegations a decree for declaration has been claimed, about the land being of

public way, the defendant no.1 having no right to sell, and the defendant no.3 acquiring no rights, and injunction was also claimed, seeking to restrain the defendant from taking possession over the land in question.

The defendant no.1, Urban Improvement Trust, filed a written statement contesting the suit, and took a stand, that there was no public way, and that the sale proceedings were taken fully in accordance with law, they are entitled to sale the land, and thus the plaintiff is not entitled to any relief. The defendant no.3 filed a separate written statement, also contesting the suit. It was pleaded, that the land does not constitute any public way, nor is it being used as public way. It was also contended, that towards this land the plaintiff had tried to keep certain aperture, whereupon the answering defendant objected, with the result that they had to be closed, and it was within knowledge of the plaintiff, that the land is of the ownership of the answering defendant. Thus, the plaintiff is estopped from raising the objection, and has no cause of action. It was also pleaded, that despite publication of notice by the Trust in the news paper, no objection was raised. The suit was claimed to be time barred, and an objection was also taken about non maintainability of the suit for want of notice under Section 80 C.P.C.

The learned trial court framed as many as 10

issues. However, crucial issues no. 2 and 7, being as to whether the land in question is public way, and was being used as such, and as to whether the land is not capable of being sold, were decided by the learned trial court against the plaintiff. The other issues, being the issue of estoppel and limitation, were all decided in favour of the plaintiff. Deciding issue No.2, it was found, that the plaintiff has admitted in cross-examination, that the way ends on the well and does not go ahead, well is government well from which water is supplied, and is bounded by boundary wall on all the four sides, she does not know as to whether any public person goes to well to fetch water or not. She admitted that she opened the windows towards this land, and were closed on the objection of the defendant. It was also found, that the statement of the plaintiff is not corroborated by any documentary evidence, and simply because there is well, which also is bounded by wall on all the four sides, it cannot be said, that the land is land of public way, more particularly when there is nothing to show that the public goes to well for fetching water. Regarding the proceeding of UIT dated 24.10.67, considering the land to be of public way, it was found, that the order passed in these proceedings had been set aside by the State Government vide Ex.A/4, and had ordered regularisation of sale in favour of defendant No.3. With this, the learned trial Court found, that the learned counsel for the plaintiff has not been able to show, as to how the UIT did

not have right to sell the land, and merely from this note-sheet it cannot be said, that the land was a public way. Likewise, deciding issue No.3, relating to validity of the sale, it was found, that the UIT had requested the State Government to cancel the sale, but vide Ex.A/4 the State Government ordered its regularisation, and thus, the land is sold, fully in accordance with law. Obviously in view of the decision of issue No.2 and 3, issue No.7 was also decided against the plaintiff.

It may be noticed here, that the only evidence led on the side of the parties, comprises of statement of plaintiff's mother, the power of attorney Smt. Swarnlata, and the defendant No.3 himself.

In appeal, the learned lower Appellate Court reversed the finding on issue No.2, by considering, that no plan of Rathkhana Colony has been produced on record. While such plan was prepared, as appears from proceedings registered on 24.10.67, wherein it is recited, that the Secretary, UIT had put a note on 12.8.61, about the land being in Rathkhana Colony, and there being a well, 50 ft wide lane was left for well, and by allotting 2100 sq. ft. land, the way would be reduced to 20 ft. With this it was concluded, that the plan was prepared, which has not been produced by the UIT, and therefore, adverse inference would be drawn against the trust, and since in this report it is

clearly mentioned, that there is 50 ft wide way, and in the Patta of the plaintiff, being Ex.2 also, way is shown in the east of his house. Thus the land has been concluded to be land of way, and in absence of any material on the side of the defendant, about this plan having been changed, and the finding of the learned trial Court has been reversed. It was also held, that the learned trial Court was in error in not holding the land to be of public way, simply because the way terminates at the well, and does not go ahead. In the opinion of the learned lower appellate Court, even if that be so, it does remain a way. In the opinion of the learned lower Appellate Court, when the way has been left in the plan, without effecting changes in the plan, the land cannot be sold, simply because in the opinion of the UIT the way is not being used. Then while considering issues No.3 and 7, it was found, that no notice was published regarding application of defendant No.3, and it is not shown by the defendant, that the land is strip of land, therefore, it was found, that the UIT had no right to sell the land.

The present appeal was admitted vide order dated 16.10.90, by framing two substantial questions of law, being as under:

> "1) Whether the first appellate Court seriously erred to hold that the suit was not within limitation?

2) Whether the first appellate Court committed serious error in holding that the suit land was a land of public way?”

I have heard the learned counsel for the appellant, and the learned counsel appearing for the UIT. Nobody has appeared for the plaintiff respondent despite service, and even today. I have also gone through the record of both the learned courts below, closely.

Coming to the first substantial question of law, as framed; the learned trial Court has found, that though the plaintiff has admitted, that it was in the year 1966, that it had come to her notice, that the land has been sold to the defendant, but then, it was considered, that vide order dated 24.10.67 the UIT had written to the State Government, to set aside that sale, and the State Government vide Ex.A/4 permitted the sale to be regularised in December 1969, and therefore, the limitation has to be computed from December 1969 only, and the suit filed in the year 1971 is within limitation. This finding has not been challenged by the present appellant before the learned lower Appellate Court, and as such now it is not open to the appellant to assail this finding, apart from the fact, that on merits also, on the face of Ex.A/4, I do not find any error in this finding.

Coming to question No.2, which is the crucial

question; obviously it is not in dispute, that the UIT had no right to sell the land of public way, and since the land had been sold, the precise question is, as to whether the land is land of public way. Ordinarily, and on the face of it, the finding on this question is a finding of fact. However, the circumstances, in the present case, are writ large, inasmuch as, the finding is clearly based on no evidence, and is an out come of misconception.

As noticed above, the only evidence led in this case on the side of the plaintiff is the statement of P.W.1 Swarnlata, the mother and his power of attorney holder, and a look at her statement shows, that she has deposed that this 50 ft wide way has been shown in the site plan. Admittedly no site plan has been produced. Likewise, she has also deposed, that this land has been so shown in the scheme of UIT. Again admittedly, no copy of the scheme has been produced, which could be a piece of evidence to show, that the land was kept as a land of way, so as to be not available to be sold by the UIT. With this, the admissions made by the plaintiff, in her cross-examination, about the nature of user of the land, does clearly demolish her evidence, about the land being part of the public way. This is one aspect of the matter. The other aspect of the matter is, that the learned lower Appellate Court has proceeded to draw adverse inference against the UIT, for non-production of plan and scheme. In my view, the plaintiff is to stand

on his own legs. May be that he could have summoned documents from the UIT, and if any prayer were made in that behalf, and the Court had directed the Trust to produce the documents, and still if they were not produced, then obviously the adverse inference could have been drawn, but in absence of anything of this sort having been done, such drawing of inference is wholly uncalled for. Over and above all this, vide Ex.A/4, the State Government had clearly directed the regularisation of the sale in favour of defendant No.3, which clearly amounts to directing change of the user of land, to have been authorised by the State Government, who is the authority, which ultimately approves the scheme. In that view of the matter, the question No.2, as framed, is required to be answered against the respondents, and in favour of the plaintiff, and is accordingly answered.

The net result is, that the appeal succeeds, and is allowed. The judgment and decree of the learned lower Appellate Court is set aside, and that of the learned trial Court is restored.

The parties shall bear their own costs throughout.

(N P GUPTA),J.

/Sushil/